

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS**

**LEXINGTON INSURANCE COMPANY AND
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH,**

Plaintiffs

v.

**VIRGINIA SURETY COMPANY, INC.,
Defendant.**

**CIVIL ACTION
No. 04-11109 RGS**

**MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS, LEXINGTON INSURANCE COMPANY AND
NATIONAL UNION INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA**

Plaintiffs, National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and Lexington Insurance Company ("Lexington"), hereby move for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1. Specifically, Plaintiffs seek a declaratory judgment that:

- (1) The law of the state of New York applies to the dispute between plaintiffs and defendant regarding the priority of coverage between the insurance policies that are the subject of this action;
- (2) The terms of the insurance policies issued by National Union, Lexington and Virginia Surety are not ambiguous;
- (3) Extrinsic evidence is not admissible to vary the unambiguous terms of any of the insurance policies issued by National Union, Lexington and Virginia Surety; and
- (4) The insurance policies issued by National Union and Lexington are true excess policies, and the policies issued by Virginia Surety are true primary policies; therefore, National Union and Lexington do not have any obligation to pay either defense or indemnity to the mutual insureds of Plaintiffs and Defendant until the Virginia Surety policies are exhausted by the payment of the \$250,000 per occurrence limits of liability of the Virginia Surety policies.

Plaintiffs attach hereto, and incorporate by reference herein, the following documents:

- (a) Memorandum of Law;
- (b) Statement of Undisputed Facts pursuant to Local Rule 12.1;
- (c) Affidavit of John B. Gould;
- (d) Affidavit of Charles Messery;
- (e) Affidavit of Elizabeth Viscione; and
- (f) Exhibits A-I to the Affidavits and Statement of Undisputed Facts in Support of Motion for Summary Judgment Brought by Plaintiffs, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, Pennsylvania.

Dated: September 29, 2006

Respectfully submitted,
Defendants, ***Lexington Insurance Company
and National Union Fire Insurance
Company of Pittsburgh, PA.,***
By their attorneys,

/s/ Robert J. Maselek

Mark E. Cohen [BBO #089800]

Robert J. Maselek [BBO #564690]

Gerald S. Frim [BBO #656204]

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CERTIFICATE OF SERVICE

I, Gerald S. Frim, hereby certify that I have served this document and all exhibits thereto by hand upon counsel of record and that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on September 29, 2006.

Dated: September 29, 2006

/s/ Gerald S. Frim

Gerald S. Frim

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